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289-278—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 81

GERALD TOMASZCK AND JOSEPH D'ARGENTO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84

MIKE LAJOY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 114

PATRICK SCHANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 81 App.; Pet. No. 84 App. A; Pet. No. 114 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. Petitions for rehearsing *en banc* were denied on March 8, 1967. The petition for a writ of certiorari in No. 81 was filed on April 6, 1967, and the petition for a writ of certiorari in No. 84 was filed on April 7, 1967. The petition for a writ of certiorari in No. 114 was not filed until May 1, 1967, and is therefore out of time under the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that a lineup (at which petitioners Tomaszek, D'Argento, and LaJoy and the five other participants were asked to utter specified phrases) was conducted shortly after petitioners' arrests upon an indictment but before their presentment to a court required exclusion of the courtroom identification of petitioners by the witnesses who had identified them at the lineup. (Pets. Nos. 81, 84).

2. Whether the evidence supported the conviction of petitioner Tomaszek (Pet. No. 81).

3. Whether the trial court, by failing to grant the motion by petitioner Schang's wife for a judgment of acquittal, committed error requiring the reversal of petitioner Schang's conviction (Pet. No. 114).

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[1] A motion for an extension of time in which to file the petition was not deposited at the post office until April 8, 1967 (Pet. No. 114, p. 2), a day after the petition was due to be filed.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois under an indictment charging that on September 23, 1963, they robbed a federally insured bank at gunpoint in violation of 18 U.S.C. 2113 (a) and (d).[2] On May 10, 1965, petitioners were each sentenced to imprisonment for a period of fifteen years. The court of appeals affirmed the convictions.

1. On September 23, 1963, at about 11:30 a.m., four men entered the Franklin Park Bank in Franklin Park, Illinois. Each wore one-piece coveralls and a hood made of T-shirt material with openings for the eyes (Tr. 155–157, 604–608, 797–798, 1460–1464).[3] The men ordered the persons present to remain where they were (Tr. 157). The first man stationed himself near the entrance; the second, carrying a revolver and a cardboard carton, vaulted into a teller's cage and began emptying the contents of the tills; the third, who was carrying an automatic pistol, began taking the cash from the other teller's cages; and the fourth man stood in the lobby with a revolver in his hand (Tr. 156–161, 168, 173, 278–279, 286–289, 604–615, 799–810, 860–861, 895, 1185–1197). The fourth man wore dark-rimmed glasses and had an unusual posture, holding his head in a forward position close to his shoulders with his chin jutting out (Tr. 166, 301–302).

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[2] Petitioner Schang's wife was charged with aiding and abetting petitioners, but was found not guilty by the jury.

[3] "Tr." refers to the transcript of the trial proceedings. "H. Tr." refers to the transcript of the hearing on the motions to suppress.

About one minute after they had entered, the fourth man called "Time's up", and "Let's go" (Tr. 174, 290–291, 615, 810, 1195–1196). The men thereupon ran out of the bank, with more than $43,000 in cash stuffed in the cardboard carton (Tr. 1203). They entered a waiting 1963 Chevrolet automobile driven by an unmasked fifth man (Tr. 1463–1466).

As the automobile began speeding away, two police cars, which had been alerted by a remote alarm actuated by a bank employee (Tr. 797–798, 1804, 2227), arrived at the scene and followed the departing automobile (Tr. 1467, 1804, 1807–1808, 2230–2231). The chase reached speeds of ninety to one hundred miles an hour (Tr. 1814–1819). At one point, one of the officers saw two flashes in the rear window of the 1963 Chevrolet, and at the same time saw the window shatter (Tr. 2232). One of the police cars skidded into a spin but the other continued the pursuit (Tr. 1812–1823, 2232–2235). Shortly afterwards, the 1963 Chevrolet turned west on Minneapolis Street and then made a turn north into an alley between Dora Street on the west and Sarah Street on the east, losing the second police car in the process (Tr. 1822, 2022–2023, 2028–2030, 2823–2828). The vehicle stopped a short distance up the alley (Tr. 2033–2034). Several men, still wearing coveralls and white masks, got out of the car; one ran to the east toward Sarah Street, the others ran to the west toward Dora Street (Tr. 2035–2045). The car turned west into the garage at 3115 Dora Street (Tr. 2039–2040, 2135–2138)—an unoccupied residence owned by the uncle of petitioner LaJoy (Tr. 4895–4899, 4903–4906).

A few minutes later, petitioner Tomaszck, dishevelled and perspiring, was observed walking rapidly southward on Sarah Street toward Minneapolis Street from a point opposite the part of the alley where the car had stopped (Tr. 2822–2835, 2856, 2860, 2887–2893). (A pair of coveralls with a loaded .38 caliber revolver in one pocket was later found under a bush between the same point in the alley and Sarah Street (Tr. 2262–2269).) At about the same time, petitioners D'Argento and Schang were observed walking westward from the driveway at 3115 Dora Street (Tr. 2539, 2545–2555, 2967, 2970–2978, 3216–3223, 3260, 3264). Petitioner LaJoy then came out of the house at 3115 Dora Street and walked north (Tr. 2539, 2547–2549, 2556–2557). (Another pair of coveralls, two masks made from white T-shirts, an empty cardboard carton and a loaded M–1 rifle, were later found in the house (Tr. 2139–2147); additional clothing and a loaded automatic pistol were found in an adjoining yard (Tr. 2256–2262); another T-shirt mask and an expended M–1 cartridge shell were found on the floor of the automobile behind the shattered rear window (Tr. 3857, 3860, 3864–3870).) Shortly afterwards, petitioners D'Argento and Schang were observed arriving at Angela's Restaurant, located a few blocks due west of 3115 Dora Street (Tr. 3321–3324, 3327–3331, 3353–3355, 3489–3493, 3501, 3559–3560, 3568–3569, 6215–6235).

2. A sealed indictment was returned against petitioners on September 26, 1963; warrants of arrest were issued; and bail was fixed at $50,000 (H. Tr. 1428–1432).

The following morning, at about 5 or 5:15 a.m., petitioners Tomaszek, D'Argento, and LaJoy were arrested at their respective residences by agents of the F.B.I. (H. Tr. 119–122, 647, 651, 1237–1240, 1912–1916). Each petitioner was informed that he did not have to say anything, that anything he did say could be used against him in court, and that he had a right to consult an attorney (H. Tr. 120–122, 1245, 1283, 1913, 1916–1917). Petitioners D'Argento and LaJoy did not ask to talk to an attorney (H. Tr. 148, 1920–1921); petitioner Tomaszek stated to the agents that it was too early to telephone his attorney (H. Tr. 1246). The agents searched petitioners' residences, prepared receipts for all items seized; and gave petitioners the opportunity to shave and dress (H. Tr. 124, 126, 132, 378–379, 1241, 1251, 1254, 1917, 1922). Petitioner D'Argento was taken to the F.B.I. offices about 6:30 a.m. (H. Tr. 1923). He there telephoned his attorney and consulted with him (H. Tr. 1924, 1951–1952). Petitioners Tomaszek and LaJoy were taken to the F.B.I. offices at about 8:45 a.m. (H. Tr. 146, 1257). All three petitioners were fingerprinted, photographed and given something to eat (H. Tr. 146, 1332, 1926, 1926). About 9:30 a.m., an attorney for petitioner Tomaszek, whom Tomaszek had told his wife to call (H. Tr. 1254–1255), telephoned the F.B.I. office, asked what Tomaszek's status was, and asked whether he could see him. An agent answered the attorney's questions and assured him that he could see Tomaszek (H. Tr. 1257–1260, 1394–1395).

Shortly before 10 a.m. petitioners were taken to a room for a lineup. The evidence as to the manner of

conducting the lineup is summarized in the opinion of the court of appeals as follows (Pet. No. 81, App. pp. 4a-5a):

> The lineup was held in an ordinary large room in the FBI office with normal hanging ceiling fluorescent light fixtures. The rear lights were turned off and the front lights turned so that the people in the lineup would not be able to clearly see the witnesses attending the lineup. Two separate lineups involving two different groups of witnesses were carried on so that the witnesses might be kept separate and not able to communicate with one another or observe what another witness might have written on the piece of paper.
>
> Defendants LaJoy, Tomaszck and D'Argento took part in the lineup on the morning of September 27, 1963. The lineup started functioning about 10 a.m. Eighteen possible witnesses observed the lineup. Prior to viewing the persons in the lineup, the witnesses were informed they were going to observe a group of individuals. They were not told the names of the persons they would view, or their backgrounds.
>
> Each person in the lineup was numbered. Three of the eight people in the lineup were defendants in the instant case. The other five were FBI agents or employees. Some of the FBI employees were attired similarly to the defendants. The witnesses were kept separated and were not permitted to communicate with one another. The witnesses were told that if they recognized any of the persons or the characteristics of any of the persons in the lineup, in any way, they should write down on a piece of paper the number of such person. They were

also informed they would later be interviewed by the FBI agents concerning the number or numbers of the persons they had written down.

No names were used in addressing the participants in the lineup. They were addressed by their number only. Each man in the lineup was required to make statements in regular order beginning with No. 1. Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. The commands of the FBI agent were in the same tone of voice as to each person.

At the conclusion of the lineup, petitioners were taken to the office of the United States Marshal, arriving there between 10:30 and 11 a.m. (H.Tr. 44–45, 147, 1841–1842). The district court was not immediately available to hear bail matters (H. Tr. 198), but at some time between noon and 2 p.m., petitioners Tomaszck and LaJoy appeared with their attorneys before the district court and both petitioners posted the requisite bond (H. Tr. 46, 198–199, 1190, 1203–1204).

Various witnesses at the trial who identified petitioners had identified them at the lineup.[4]

ARGUMENT

1. This Court's recent decision in *United States* v. *Wade*, No. 334, October Term, 1966, June 12, 1967,

[4] The president of the bank identified Tomaszck as resembling the man who stood in the lobby holding a revolver (Tr. 185–190, 374–376, 388–389, 583–585). Two housewives, both of whom lived near the corner of Minneapolis and Sarah Streets, identified him as the man they had observed walking away from the terminus of the getaway car (Tr. 2834, 2844–2845, 2871, 2896, 2948–2949, 2959).

establishes that the placing of petitioners Tomaszck, D'Argento, and LaJoy in a lineup at which they were asked to speak for voice identification did not violate their privilege against compelled self-incrimination; and the requirement announced in *Wade* that a lineup participant be afforded a right to the presence of counsel during the identification procedure is applicable only to lineups conducted after the date of that decision. *Stovall* v. *Denno*, decided June 12, 1967, No. 254, October Term, 1966. Since the lineup here was conducted fairly (see Statement, *supra*, pp. 7–8), no independent due process question exists or was raised.

The three petitioners contend, however, that since the lineup took place between the time of their arrest and the time of their appearance before the district court, the government agents violated Rule 9(c), F.R. Crim. P., which requires an arrested person to be brought "promptly before the court," and that the testimony of the identifying witness should be rendered inadmissible as a sanction similar to that imposed by *Mallory* v. *United States*, 354 U.S. 449, with respect to statements obtained as a result of an "unnecessary delay" in violation of Rule 5(a), F.R. Crim. P. The *Mallory* rule, however, serves as a prophylactic against possible official overreaching to secure from a suspect that which he has a right to withhold. An accused has no right not to appear in a lineup any more than he has a right not to be fingerprinted. A brief delay for this legitimate police technique is not unreasonable and has been held not to constitute an

unnecessary delay under Rule 5(a). *Caldwell* v. *United States*, 338 F. 2d 385, 388–389 (C.A. 8), certiorari denied, 380 U.S. 984; see *Copeland* v. *United States*, 343 F. 2d 287, 290 (C.A.D.C.); *Ralph* v. *Pepersack*, 335 F. 2d 128, 139 (C.A. 4), certiorari denied 380 U.S. 925; *Trilling* v. *United States*, 260 F. 2d 677, 683 (C.A.D.C.).

Here, the delay attributable to the lineup amounted to approximately thirty minutes, the remaining time between arrest and presentment having been consumed by the incidental searches of petitioners' residences, the cross-town drive to the F.B.I. offices, the general processing and photographing and fingerprinting, and the post-lineup wait in the cell at the United States Marshal's office until the district court had time to hear the matter. From the record, in fact, it appears that the district court would not have reached the case sooner if petitioners had been made available at 10 a.m., when the court first opened, rather than between 10:30 or 11 a.m., when they were taken to wait in the Marshal's office (see H. Tr. 198). Accordingly, as the district court found at the conclusion of the hearing on the motions to suppress (H. Tr. 2624, 2628–2629, 2633; see 2613–2614), there was no unreasonable delay here.

2. The evidence was plainly sufficient to sustain the conviction of petitioner Tomaszek. Although the robbers had been masked, an eyewitness to the offense identified petitioner Tomaszek—by his glasses, his size, and, more particularly, by his unusual manner of holding his head thrust forward, close to his shoulders, with his chin jutting out—as resembling the

fourth robber who had stood in the lobby holding a revolver (Tr. 166, 185–187, 189–190, 301–302, 583–585). When the getaway car stopped in the alley, a man wearing coveralls and a T-shirt mask left the vehicle and ran eastward toward Sarah Street (Tr. 2035–2045). A few minutes later, petitioner Tomaszek was seen walking rapidly on Sarah Street from a point toward which the robber had been running (Tr. 2829–2835, 2856, 2860, 2887–2893, 2898). He was perspiring, his hair was rumpled, and while walking he put on a pair of glasses (Tr. 2833–2834, 2890). He appeared to be carrying a white fabric in his hands (Tr. 2833). Between the point where the robber was last seen and the point where petitioner Tomaszek was first seen, a pair of coveralls and a revolver were found under a bush[5] (Tr. 2262–2269). Additionally, on several occasions prior to the robbery petitioner Tomaszek had been observed in the company of petitioner Schang (Tr. 4839–4841), the unmasked driver of the getaway car (Tr. 1467). The jury's finding was thus amply supported.

3. Petitioner Schang argues that the trial court erred in failing to grant Mrs. Schang's motion for a judgment of acquittal at the time she rested her case, and that, in consequence, he was improperly deprived

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[5] Petitioner Tomaszek points out that a raincoat, which was worn over the coveralls of one of the first three robbers rather than the fourth, was also found east of the alley (Pet. No. 81, p. 9); presumably indicating that someone other than he was the man who had run eastward. The raincoat, however, was discovered just past the east edge of the alley, and at a point adjacent to the spot where the car had first stopped—a point where it could have been tossed by any of the occupants of the vehicle (see Tr. 2256–2262).

of an opportunity to call her as a witness who could testify without her credibility being tainted by her being under indictment.

The evidence showed that about 11:50 a.m. on the day of the robbery, Mrs. Schang left her house telling her maid she was going to buy sandwiches. She walked toward an automobile she had borrowed but turned suddenly when two men in a vehicle with a police-type light and a long radio antenna pulled into the parking space behind the borrowed car (Tr. 3760–3764, 3777, 3779, 3788–3791). After one of the men left the car carrying a sewer rod and walked toward a nearby intersection (Tr. 3792), Mrs. Schang reappeared, entered the borrowed automobile and drove at a speed of almost seventy miles an hour to the parking lot at Angela's Restaurant (Tr. 3792–3795). Petitioner D'Argento and Schang came out of the restaurant, entered the car, and were driven away by Mrs. Schang (Tr. 3339–3351). Mrs. Schang later returned to her residence alone (Tr. 3763–3764).

Mrs. Schang's motion for acquittal at the close of the government's case was denied (Tr. 5297–5298) after extended argum nt (Tr. 5064–5151). Mrs. Schang then rested her case without presenting any evidence in her defense (Tr. 5305), and renewed her motion for a judgment of acquittal. The trial court stated that it would reserve decision in order to avoid any possible prejudice a judgment of acquittal might cause the other defendants who had not yet rested their cases (Tr. 5644–5645, 6326–6327). Counsel for petitioner Schang then noted that Mrs. Schang would be a more valuable potential witness for petitioner

if she could testify "free of the contamination of an indictment over her", and that he would like a ruling on Schang's motion before he rested since he "may want to use Jean Schang as a witness cleared of this charge" (Tr. 5312–5315). Counsel later requested that Mrs. Schang be granted a judgment of acquittal, noting "I do not intend, unless Jean Schang is acquitted, to place her on the witness stand. If she be acquitted I will then make that determination in the light of the remainder of the defendants' testimony" (Tr. 5642). The court continued to reserve its ruling (Tr. 5645).

There was no error by the district court. Rule 29(b), F.R. Crim. P., specifically permits a court to reserve decision on a motion for acquittal until the case has been submitted to a jury. In any event, denial of the motion was justified. The evidence showed that Mrs. Schang aided her husband and another robber to avoid detection by picking them up within a short walking distance of the abandoned getaway car. The only real question was whether from all the circumstances it could be inferred that her participation in the escape was pre-planned. If so, she could be convicted as an aider and abettor; if not, she would be only an accessory after the fact. The court properly left resolution of the question to the jury, since "giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States*, 160 F. 2d 229, 232

(C.A.D.C.), certiorari denied, 331 U.S. 837. While Schang's counsel indicated that he might wish to call Mrs. Schang as a witness if she were acquitted, he never offered any indication of the nature or importance of her possible testimony, and at no point before resting his case did he represent that he was in fact ready to call her to testify if she were acquitted. In these circumstances, petitioner Schang cannot claim prejudice from the court's reservation of its decision.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1967.

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[6] Petitioner Schang raises, but does not argue, the question whether he and his wife should have been granted severances and separate trials (Pet. No. 114, p. 3). That question was not raised in the court below, and hence it is not properly before this Court for consideration. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

U.S. GOVERNMENT PRINTING OFFICE: 1967